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ADDRESS

OF

HON. J. B. FORAKER

TO

THE CONSTITUTIONAL CONVENTION OF OHIO

MARCH 14, 1912

PRESENTED BY MR. BURTON

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ADDRESS OF THE HON. J. B. FORAKER TO THE CONSTITUTIONAL CONVENTION OF OHIO, COLUMBUS, MARCH 14, 1912.

MR. PRESIDENT AND GENTLEMEN OF THE CONVENTION: I thank you for the invitation that has brought me here, although I fear I may not be able to greatly interest or help you.

I did not feel at liberty to decline to address you on that or any other account, because the work in which you are engaged is one of such high dignity and such far-reaching importance and consequence that all your requests should be regarded as commands.

In view of the long time you have been studying the subjects you have under consideration and after the many addresses to which you have listened, I do not hope to say anything new, but only to further elucidate, if that be possible, views with which you are already familiar.

Before I touch upon any controverted question, let me speak of your work as a whole.

WORK AS A WHOLE.

It is commonly and properly accounted of much higher dignity and importance than that which usually falls to the legislature.

This is because it deals with fundamental principles that do not change, while the other deals with circumstances and conditions that are constantly changing. In framing an organic law you are governed by human nature and standards of morality that continue the same through all generations; that are the same to-day that they were when our government was organized, when the common law was established, in the days of the ancient governments of Rome and Greece and Egypt, and that will be the same so long as the world stands.

Of course, as we go along, living under a written Constitution, it may develop that some power has been omitted or inadequately provided for, or that some plan for executing some purpose can be improved, and in consequence an amendment may be necessary, but if the form of government and the general distribution of powers be satisfactory, there will be little necessity to make changes or additions.

In the century and a quarter we have lived under the Federal Constitution we have found it necessary to make only 15 amendments, and 10 of these were submitted to the States for ratification almost cotemporaneously with the submission of the Constitution itself. In other words, in more than a hundred years we have made only five amendments to the Constitution of the United States, and three of these were made necessary by the Civil War.

When our fathers framed that instrument they had never heard of steamboats, or railroads, or electric motive power, or of any one of a

thousand other things of which we have knowledge and are constantly making use, and yet the work they did has been found capable of being adapted to and to provide for all the numerous changing conditions and relations of society that have resulted in consequence. It has not been necessary to strike out from or add to the instrument they framed a single word on any such account.

But while it has been necessary to make only this limited number of changes in our Constitution, it has been necessary for the legislative department of the Government to enact thousands of pages of statutory provisions, most of them made necessary by the ever-changing conditions that have marked the progress of the world.

This is practical proof of the weightiest character, that in making an organic law we should confine ourselves as nearly as possible to that which is elementary, fundamental, and unchanging, while the legislature should be authorized to deal with that which is inconstant. The one should deal with that which can always with a reasonable degree of certainty be foreseen, while the other must deal with that which it is impossible to foresee, and which can be dealt with intelligently only when it comes to pass. The one is intended to stand indefinitely; the other as occasion may require. Stating the same thing in another way, a constitution should deal only with great principles and it should deal with them only in a broad way, while the legislature, on the other hand, must attend always to details.

Such being the character and offices respectively of these two kinds of law, it follows that specific details are out of place in a constitution, but imperatively necessary in a statute. The one confers power and regulates its use; the other prescribes duties and regulates human conduct.

Specifications as to how much power shall be conferred and in what particular manner and under what particular circumstances it shall be employed, weakens, hinders, and often defeats altogether the purposes to be subserved.

But the greater and more specific the details in fixing a rule of conduct the more certain will be its observance.

BREVITY.

The men who framed the Constitution of the United States understood this distinction thoroughly and observed it carefully.

They aptly defined the purposes of their work, provided for the federation of the States, the character and powers of the National Government, its three departments, their respective authority and organization, including a system of elections for President and Vice President, Senators, and Representatives in Congress, the appointment of judges, their jurisdiction, tenure and impeachment; they provided for our foreign relations, for an Army and a Navy, and established a Treasury, with a revenue system to support it. They authorized all the legislation of different kinds that it has been found necessary to enact to govern the Indian tribes and regulate our domestic and foreign commerce, together with all the steamboats, railroads, telegraph lines, express companies, and every other kind of carrier or facility that ever has been or ever will be employed in connection therewith, and did it all in a compass of 7 articles, consist-

ing of an aggregate of only 24 short sections, embracing all told less than 4,400 words. Some of our latest State constitutions with more than 40,000 words are in painful contrast.

You may not be able to excel, but you can at least emulate their example.

LET US REASON TOGETHER.

You have many great questions to deal with, but I shall discuss only the initiative, referendum, and recall.

These are new questions that have broken upon us like a storm. They are of such commanding importance that I pass everything else by that I may speak of them the more fully; but first let me indicate, if I can, with what spirit I speak.

I have great confidence in all my fellow citizens. I believe most men want to do what is right—what will most promote the public welfare—and that, with only the rarest exceptions, all are patriotic enough to sacrifice bias, prejudice, ambitions, personal advantages, and all unworthiness for the public good as freely as they would peril life itself for the national flag. All they need to know is what is right, what is best, what will give us the best results for all, the greatest good for the greatest number, make us the strongest and most respected, and, knowing this, instantly that will be done.

This is true of the men of all parties, creeds, and classes.

The most impressive legislative scene I ever witnessed was presented when the United States Senate, having become satisfied that war with Spain was inevitable, put a measure on its passage appropriating $50,000,000, to be immediately available, for the national defense, and, without a word of discussion, debate, or comment of any kind, ordered the call of the roll and voted unanimously in its support.

All party differences, all personal and political antagonisms of every kind were effaced and forgotten in the presence of the country's danger, and Republicans, Democrats, and Populists all alike remembered only that they were Americans.

And so it must be here in this body. The law governing your selection to be delegates to this convention was purposely so framed as to make you free in the discharge of your duties from all kinds of extraneous obligations and give you an eye single to the highest and best interests of our beloved Commonwealth.

It should not be doubted that you are imbued with the spirit it was intended you should have and that you are therefore open to argument, to reason, to persuasion. I shall strive in all I may say to show myself in full sympathy with you in that respect. In this spirit let us reason together.

Harsh words, bitter personalities, acrimonious imputations do not bring men together, but force them further and still further apart.

Unless sincerity and mutual respect for honest differences hold sway this hour will be wasted.

Great waves of sentiment for reform or radical changes in established laws and conditions never start without some moving cause.

That cause may be all right, in which event the results will be for good; or it may be all wrong or out of all proportion to the commo-

tion it excites, or the wave may gather a volume and intensity that will make it more dangerous than the evil of which it is born.

In any of these events the results will not be helpful. They may not be ruinous, but they will not be beneficial.

It behooves us when such waves come to study them carefully, to ascertain the cause, and then guide them aright if calculated for good and to check, control, and stop them if they threaten evil.

We have had many such experiences. Within the memory of all of us we have had the greenback wave, the free-silver wave, the sound-money wave, the antirailroad wave, the temperance wave, the antitrust wave, and many others of more or less importance that you will readily recall. Some, in the light of subsequent events, appear extremely unwise, others just the opposite, but some good came out of each of them.

Men differed about them—honestly differed—but finally, after conflict and contests and argument and discussion, reached acceptable results; then the storms passed by, the waves subsided, and our ship of state sailed on over smoother seas, only stronger for the buffetings to which it had been subjected.

So it is and will be with the wave that is upon us now. Men differ about it—honestly differ. Men who are conscientiously struggling for the same ultimate good see with different lights.

If rightly conducted, all such contests not only clarify the situation, but they are educational; they make men nobler and stronger, and thus we are all benefited. Differences are not, therefore, to be deplored. If rightly considered and adjusted, they usually prove blessings in disguise.

It is all according to God's providence that we should be so tried and tested.

INITIATIVE AND REFERENDUM.

First, now, of the initiative and referendum. As abstract propositions they are old, but not familiar.

Not to go beyond our own history, when the Constitution of the United States was framed it was submitted by the convention that framed it to the people of the several States for ratification before it was put into operation. That was referendum.

When the first constitution of Ohio was adopted the convention that framed it did not submit it to the people for ratification, but promulgated it and put it into operation without giving the people any opportunity to approve or disapprove.

That was not referendum. Time developed imperfections and insufficiencies in that instrument, but this failure to submit it to the people for their approval was one of the causes, in addition to others, on account of which it was superseded by the constitution of 1851.

The practice of submitting constitutions and their amendments to the people for ratification and adoption has been generally observed in all the States of the Union.

In some of the States, even though their constitutions did not provide for it, legislative measures of a local character have also been occasionally submitted to the people for approval before putting them into operation.

In the same way a form of the initiative has been sometimes recognized in connection with local legislation without any special authority for it.

There are some judicial decisions on the subject.

With but little conflict the courts have held that where the constitution of a State has vested all legislative power in the legislature and is silent on the subject, both the initiative and the referendum may be exercised as to the legislation of municipalities and local subdivisions, but not as to general legislation affecting the whole State.

The foundation for the distinction is stated by Judge Cooley in the discussion of another subject, in his work on Constitutional Limitations, as follows:

* * * The legislature can not delegate its power to make laws, but fundamental as this maxim is, it is so qualified by the customs of race and by other maxims which regard local government, that the right of the legislature, in the entire absence of authorization or prohibition, to create town and other inferior municipal organizations and to confer upon them the powers of local government, and especially of local taxation and the police regulation usual with such corporations would always pass unchallenged. The legislature in these cases is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers is not understood to belong properly to the State.

It is not necessary, therefore, to change our constitution to authorize both the initiative and the referendum as to local legislation; but it is necessary to change it to authorize the exercise of these rights by the electors of the whole State.

It is because of this holding of the courts that it was competent for our last legislature to authorize the initiative and the referendum in municipalities; and competent for a preceding legislature to enact the Rose County local-option law, because under it action is taken by counties upon the petition of a prescribed number of voters.

The same is true as to all the laws we have had subject to local votes authorizing municipal and township local option, the location of county seats, the building of bridges, the making of local improvements, and doing many other things that might serve as illustrations to show that in various ways we have always had a species of initiative and referendum, although we have not heretofore commonly employed these names to designate such proceedings. Our experience in this respect should be of value to us now.

According to this experience where the electorate is not too large, and where the question submitted is simple, and one affecting either the pocketbooks or the personal habits of the people, a good vote and an intelligent vote is usually secured; but when the number of voters is large and the questions are complicated or have reference to the community as a whole and nobody in particular, the vote is generally very light as compared with that cast for the candidates for office voted for at the same time, and consequently the public expression so secured is correspondingly less satisfactory.

We have had the same experience with respect to constitutional amendments that have been submitted to be voted upon by all the electors of the State.

We should bear in mind, therefore, that if it be the purpose of the initiative and the referendum to secure an expression of the voters with respect to local legislation, we have all the power and authority

now necessary for that purpose without changing our constitution, and that in the second place we are likely to get the most satisfactory expressions only when the numbers to vote are smallest and the questions submitted are simplest; particularly is all this true when the questions submitted do not involve sumptuary legislation or affect individual property rights. When these features are involved there is always as a rule a large vote.

But what we are now called upon to consider is not the initiative and referendum as applied to local subdivisions and to simple and distinct propositions of legislation, such as whether a community shall be wet or dry, the courthouse shall be located at one place or another, a particular bridge shall be built or not built, but whether or not we shall have general legislation affecting the whole State, to be submitted to all the electors of the whole State; and not only general legislation, but the most complicated as well as the simplest kind of general legislation, and be compelled to accept or reject without privilege or power to debate or amend.

For the proposal, as you have formulated it, is that on the petition of a small percentage of the voters any law enacted by the legislature having general operation throughout the whole State shall be submitted to the voters of the whole State for their approval before it shall be allowed to go into operation; and that on a like petition any bill that anybody may draft shall be submitted to the whole body of the voters of the State for approval, and that securing a majority vote in its favor it shall become a law, even beyond the power of the governor to veto it.

All concede that this involves a radical change in legislative methods; but the advocates of these propositions tell us that they do not involve an abandonment of representative government or any experiment; that they have been put into operation in Oregon, California, and a number of other States, and that they have been found effective for good results; that the movement was conceived and inaugurated to cure conditions of political bossism and corruption; that the people had lost control of their own Government, and in this way that control has been restored to them; and that no one should oppose these propositions unless he is afraid to trust the people; and that as wholesome results have been secured elsewhere, so, too, can they be secured here in Ohio.

WOULD ADD TO BURDENS OF LEGISLATION.

There are a number of objections that should be considered.

In the first place it would increase the burden of elections, if not by increasing the number, at least by increasing our duties and responsibilities.

With only a duty of choosing between candidates and platforms we have found elections such a disagreeable responsibility that we have wisely sought to minimize their number and simplify their character.

In this behalf only a few years ago we abolished our October elections and later consolidated elections of Congressmen and State officials so as to have all occur in even-numbered years and municipal and other local elections so as to have them occur in odd-numbered years.

If now in addition to candidates and platforms we are to be compelled to consider and vote on all kinds of local and State legislation every time we go to the ballot box, we shall find election day the busiest and most burdensome of all the year, since although the mere voting may be a small matter, yet the duty that will be placed upon us by this change will be onerous indeed.

The reading, study, and labor attendant upon the general investigation and inquiry we must make to familiarize ourselves with the many measures we are likely to be required to pass judgment upon will be exacting beyond any experience we have ever had with elections. It has been said there will be a compensation in the education the people will get and the gratification that will come to them from a realizing sense of duty performed.

As to may people this may be in some measure true, but there will be a large percentage of the voters who will not appreciate the benefit thus received. It is too intangible to be an inducement to a large percentage who will always be so practical as to be more concerned about their own affairs than they are about those of the State.

It has also been suggested that there may be but little resort to these methods in actual experience; that the great value to the public is in the moral effect of the knowledge that such weapons are at hand.

There are two answers.

In the first place, if they are to be little used, it is not important that we have them. "The game will not be worth the candle." In the second place, practical experience where these measures have been adopted shows the contrary. In Oregon, where the initiative and referendum have been in operation some years, there has been a growing increase in the number of measures voters have been called upon to approve or disapprove at each State election.

There were only two such measures in 1904, the first year; 11 such measures in 1906; 19 in 1908; while in 1910, 32 legislative measures were submitted under the initiative and referendum. In Oregon, the State prints and distributes these bills with explanations and arguments, limited to 200 words, for and against each measure.

According to the proposal you have adopted these arguments are to be limited to 300 words each.

In Oregon, in 1910, these bills and the explanations and arguments made a book of 208 pages. Each voter was expected to study carefully each bill and the argument for it, and the argument against it, in order to qualify himself to pass judgment upon it; and manifestly if he failed to do this he was not qualified to vote intelligently.

If we should put similar measures into operation here and should make a proportionate use of them, our voting population being ten times greater than it is in Oregon, it would mean that we would at each State election be called upon to vote upon more than 300 legislative measures, and in order to qualify ourselves to vote upon them intelligently, we would have to read more than 3,000 pages of bills and arguments, since our arguments are each to be 100 words longer than they are in Oregon; and that is more of that kind of literature than 50 per cent of the people of the United States read in a lifetime. Most people might read that amount of fiction or history for pleasure, but they would not wade through such a mass of that kind of printed

matter merely to learn how to vote. They would ordinarily rather vote in the dark or forego the privilege entirely.

But those who would not read at all would, perhaps, have less trouble than those who did. To those who would not read it could not make any difference that the power of amendment is denied—that the bills must be voted upon precisely as submitted—"not a t crossed nor an i dotted."

Every man knows who has ever had experience as a member of a parliamentary body that it is only through the power of amendment and the debate and discussion precipitated by objections that the weaknesses of bills as introduced are developed and corrected, and that without an opportunity for consideration in committee and discussion and amendment there, and on the floor of the body, it is usually impossible to reach conclusions acceptable to a majority of the membership with respect to a controverted proposition.

You do not need to go beyond your own experience for a conclusive illustration of the truth of this statement. Recall your experience with respect to the proposal for which a majority have voted with respect to the liquor question, and you will be reminded that it has been only through the employment of all the facilities of regular parliamentary procedure that you were able, finally, to reach a conclusion upon which a majority could unite; but you need not go beyond the very proposition I am discussing.

When the campaign was on, and for weeks after the convention assembled, the members who favored the initiative and referendum probably did not realize that they would have trouble to agree upon a proposal acceptable to a majority of the membership; but, according to the press advices, it has been only through long, wearisome, patient, struggling endeavor and resort to every available parliamentary facility and procedure, including the much-abused caucus, that you have finally agreed in committee upon the proposal that has been reported. What you will do when the convention acts remains to be seen.

EVASION OF RESPONSIBILITY.

Another objection, applicable to the referendum, is that it has a tendency to induce legislators to evade their responsibility as to troublesome questions of legislation, a vote on which, either for or against, they desire, for any reason, to avoid.

Again, it is unnecessary to go beyond the experience of this body for support for this objection.

A few days ago in the report of your proceedings the newspapers carried the following:

> Many delegates here to-day predicted the adoption of the woman's suffrage proposal. Several delegates stated that they would not oppose the question on the floor, for the reason that they believed the electors would defeat it when submitted.

It is fundamental that every public official should act with respect to every measure he is called upon to consider, according to his conscientious conviction of duty. All so agree, and yet it is common knowledge that we do not always get this highest and best service when it is known that no matter what action may be taken, it is not final, but subject to review.

TWO LEGISLATURES.

A more serious objection is the fact that these proposed changes would provide for practically two legislatures.

One composed of representatives duly chosen who meet in an organized body and under the obligations of an oath of office discharge their duties according to parliamentary procedure.

The other an unorganized body of electors, limited only by the total number in the State, who do not act under the responsibilities of an oath of office; who have no parliamentary procedure; who can not have the benefits of consideration by a committee, with a report therefrom; who can not amend or suggest amendments; who can not by objection and discussion and debate develop a necessity for amendments; who are largely dependent for information upon what is furnished them by the State, which would probably be greater in volume in a State like Ohio than the average voter would be able to read, let alone study and master, no matter how willing he might be to try to do so under fair circumstances.

It is not a question of trusting either the integrity or the intelligence of the people, but rather of trusting their patience and willingness to make the investigation and study necessary to enable them to act with wisdom.

We have had some experience as to what voters will do as to general proposals under ordinary circumstances. They have had a good deal of experience in Oregon.

This experience shows that on legislative propositions of a general character, not affecting personal habits or individual pocketbooks, the total vote cast ranges from about 60 to 80 per cent of the total vote cast at the same election for candidates for office, indicating that in addition to those who may vote against measures because they do not know enough about them to be satisfied to vote for them, there must be a very large percentage of voters, who, for the same lack of information, do not vote at all.

According to newspaper reports you have been advised to favor a short ballot. There is much to be said in favor of that suggestion. The chief reason for favoring a short ballot is, however, that the voters, according to the gentlemen who advocate that reform, should not be required to study the qualifications and fitness of an undue number of candidates to be voted for at the same time; but it would seem inconsistent to argue that it is too much to require of the voter that he shall pass judgment on perhaps a dozen candidates at the same time, and yet at the same time vote to approve or disapprove 30 or more, perhaps 300 or more, legislative measures, all important, and all affecting the whole State, and most of them probably sufficiently complicated to cause lawyers to differ and courts to disagree as to how they should be construed.

Experience has shown that the voter is much more likely to study candidates than he is to study legislative propositions, especially when the legislative propositions do not concern his personal habits or his pocketbook, for the record shows that everywhere in this country where experience has been had, and everywhere in Switzerland, from which country we are borrowing these ideas, with the exceptions noted, the vote will always be from 20 to 50 per cent greater upon

individual candidates than on legislative propositions. Many voters lose interest in a ballot as soon as they get through with the human being, flesh and blood part of it.

In Switzerland the neglect of the elector to vote on legislative propositions, although presented on the same ticket with candidates, for whom he voted, became so great that finally laws were passed making it compulsory for him to also vote upon the legislative proposals. But the aggregate vote for and against measures has been no larger since than it was before. The nonvoters now vote as the law requires, but they vote blanks, thereby demonstrating that while you may compel the voter to go to the polls and cast a ballot, you can not compel him to vote for or against if he prefers not to do so; and that rather than vote for or against measures he does not understand, or take the trouble to learn about, he will "shoot in the air."

MINORITY RULE.

The result is that where a majority of all the votes cast at the election is not required to carry a measure, but only a majority of the votes cast for and against the proposition, it frequently occurs that a measure is adopted by a minority vote. This has happened so often that it is a just criticism to charge that the plan is well calculated, if not intended, to enable a compact, well-organized minority to carry a proposition against an unorganized majority.

It has been stated that as a rule all men who believe in a single tax as advocated by Henry George favor the initiative and referendum because of the possibility thus afforded of enacting a law of that character.

The statement has been repeatedly made in the public press that prominent leaders of the single tax movement have said that their purpose in favoring the initiative and the referendum is to make more possible, through the compact organization of a minority, the enactment of the legislation they desire.

Without regard to what the fact may be as to that matter, it is not wise to favor measures calculated to give a minority control. That the majority shall rule is a basic principle of our institutions.

Many other objections might be made, but I shall mention only one more, probably the most serious of all.

We could survive all the evils that would likely result on account of the objections already mentioned if they should be overruled and there were no others; for none of them would be vital in character, and in time we might and would find some way to correct evils that might arise, both those which are foreseen and those which are unforeseen; but this proposed change would be attended, I fear, with far more serious consequences than any yet pointed out.

REPRESENTATIVE GOVERNMENT.

We have a representative form of government; our fathers were of the opinion that in a country of such vast areas as we have, with a population of millions, soon to be multiplied into hundreds of millions, direct government by the people was impracticable and impossible.

They therefore provided for a popular government to be conducted, not by the people directly acting in its conduct, but by representatives of the people so acting—representatives chosen by the people, because of their supposed character and qualifications for such service—all sworn to sustain the constitution of the State and the Nation and all the laws of the country.

When this form of government was adopted it was thought to be a long step forward in the science and progress of enlightened government. It was thought to solve the difficult problem of how the people could conduct a government of their own.

For more than a hundred years we apparently unanimously flattered ourselves that we had successfully solved that problem; that we had popular government; that the people did control the Government. We believed with Lincoln—that our Government was of the people, by the people, and for the people.

The American people not only have believed through all this—more than a century of national life and experience—that they have had such a government, but they have become attached to it, affectionately attached to it, because of the wonderful success they have achieved under it. This should, at least, admonish us to not make radical changes lightly or inconsiderately, but only after careful examination and with an intelligent conception, if we can get it, of the consequences.

Surely we should know whether we are to take a step backward or forward; whether it is progress or retrogression that is offered. What, then, is it that we are asked to do?

We are told that it is not an abandonment of representative government, but only a restoration. This statement concedes that abandonment would be a fatal objection. It is therefore important to ascertain whether the statement be true.

To say that the people shall do directly what they have been doing by representatives is to simply say that as to the particular matters involved they will have no representatives, and to say they will have no representatives in a given case is to say that we have at least to that extent reached the end of representative government. And that is at least partial abandonment, and that is all that has been claimed. It is the entering wedge.

If representative government had been a failure, there might be a good excuse for what is proposed, for in such a contingency it would behoove us to make some kind of change; but representative government has not been a failure. On the contrary, it has been a triumphant success.

Under it there have been many abuses. Many men selected to office have disappointed their constituents. There have been many scandals to jar our confidence, but, all things considered, we can say, without successful contradiction, that our Government and our people have been freer from troubles of this character than any other in the world.

This is particularly true as to our own State of Ohio. From the day when in 1788 civil government for the Northwest Territory was inaugurated at Marietta down until this time the history of our State and its government has been one to excite our unqualified pride.

We have had only enough disappointment to emphasize the exceptionally high character and extraordinary efficiency of those who have represented us in public life.

They may have had insufferable troubles in Oregon and California, and they probably did have. It may be they could not find any other equally efficient way in which to remedy those troubles. I would not criticize the men who in those States were compelled to grapple with conditions we may not understand and who doubtless with a patriotic and laudable purpose to restore and insure good government resorted to these methods; but however it may have been in those States, there has been no sufficient provocation for any such experiment in Ohio.

Moreover, with their smaller populations and their peculiar conditions, methods and systems may be practicable there that would not be with us. We have a vastly larger population, more varied interests, more business activities, and a restless, busy, intelligent people, who need all their time for their own affairs, and therefore prefer that legislative measures shall be framed and dealt with by representatives assembled in parliamentary bodies and acting under official responsibility.

So much of our time is so necessarily taken up with elections and legislative matters that we prefer to curtail these duties rather than enlarge them. Only a few years ago public sentiment became so strong against annual sessions of our general assembly that it forced the adoption of biennial sessions. Let us not now thoughtlessly or for some trivial cause or under some specious pretext fly to the other extreme and create another legislature of the character proposed, especially not until we have some better reason than that "it has worked well in Oregon."

Along with the initiative and referendum the recall has been put into operation in these other States and has been proposed to this convention. I understand there is not much likelihood of such a proposal being adopted, and that is fortunate. Fortunate, because most of our civil officers are elected only for the short term of two years. As to all such they are scarcely familiar with their duties until they must either retire or stand for reelection.

There is nothing in our experience to show that this, with the provisions we have for removal, is not a sufficient safeguard.

It would be a burdensome and unnecessary multiplication of our duties to compel us, from time to time, to hold intermediate elections at public expense to determine whether an official duly chosen shall be allowed to serve out the short term for which he has been elected, particularly so when we may otherwise provide as will presently be suggested.

JUDICIAL RECALL.

While their terms are longer there is a more serious objection to the recall when applied to the judiciary.

Our judges are not more sacred than other officials. They do not claim to be, nobody else claims that they are, but their services are far more important than those of any other class of officials; and it is important to us, rather than to them, that we should have in the

manner in which they discharge these duties the highest possible efficiency. Our experience has demonstrated that our fathers were wise in making our three departments of government separate, independent, and coordinate; particularly were they wise in making the Judicial Department separate and independent.

There never had been a judiciary in any country, under any Government, before their time, independent as they are, not only to administer justice as to private controversies, but also to check all encroachments upon the fundamental law of the land.

That department was made separate and independent not only because of the subserviency of the English judges when they held office only by the favor of the King, but because it was realized that we must not only have impartial tribunals for the adjudication of controversies between private litigants, but that if our written constitutions were to stand, there must be a power lodged somewhere to compel the observance of their limitations, a power that could check the encroachments of both the Congress and the Executive. Only a separate, distinct, independent department of unquestioned authority and power, beyond the control of either of the other departments, could be sufficiently independent and fearless to perform this high service. The Federal Constitution led the way in making this reform and all the older States followed, not so much from compulsion as from choice. What has been the result? In neither State nor Nation have we had anything of which to make serious complaint, but only cause for sincere pride and congratulation.

But we are told that the experience has been different in other States, and that our experience may not be so satisfactory in the future, and that for such reason the recall should be adopted and be made to apply to judges as well as to other civil officers.

All are agreed that there should be some way of removing officials from office, including judges, on account of such offenses as are now made the subject of impeachment.

It is accordingly provided in the Federal Constitution that they should be subject to impeachment, and provided in a general way what the procedure should be.

With some variance as to the grounds most of the States have adopted similar provisions.

In the Ohio constitutions of 1802 and 1851 it was provided that they might be removed by impeachment for "misdemeanors in office."

We have had little occasion to consider the efficiency of this remedy, but it may be justly criticized as too cumbersome and not easily available.

Articles of impeachment can be presented only by the house of representatives, and they can be tried only by the senate.

To set this machinery in motion would ordinarily be a considerable undertaking, even when the senate and the house are in session; but the legislature now holds only one regular session biennially, and that is rarely longer than three or four months. The result is that five-sixths of the time, or possibly 20 months out of 24, impeachment proceedings are wholly impossible; and, during the short time they are available, the machinery is so unwieldy that only an extraordinary case would induce a resort to it; and then in most instances the time

of the general assembly might be better employed. For having only one session every two years the ordinary demands for legislation leave but little time to the legislature while in session for anything else.

In consequence the remedy by impeachment as now provided would be found well-nigh no remedy at all, if we should have occasion to invoke it.

But this does not show a necessity for the recall as proposed, but rather that we should make suitable provision in some other way for a simpler method of preferring charges and a more available tribunal before which to try them, with a less cumbersome proceeding according to which the trial should be conducted.

It is not within my province or privilege to formulate a proposal for your consideration, but I suggest that it might be made the duty of the attorney general to receive and examine charges against judges and other public officials, now subject to impeachment, and if he shall find them sufficient in law, and that there is probable guilt, to put them into proper legal form and report them to the governor with a recommendation that impeachment proceedings be had; in which case it shall be the duty of the governor to summon an impeachment court, consisting of such number of members as he shall determine, not less than 3 nor more than 15, to be selected by him from judges on the bench and other citizens of the State, in such proportion as he may determine; which court shall be convened at a time and place to be designated by him, and then and there proceed to hear and determine upon the law and the evidence, the charges preferred—the attorney general representing the State, and the impeached official defending in person or by attorney. If charges be preferred against the governor or the attorney general, the chief justice of the supreme court might be authorized to act in his stead.

All the details of such a proceeding should be left to the legislature.

I am only suggesting that it is an easy matter to provide a tribunal that can be invoked at any time, with but little cost, to hear, in an orderly way, that will protect all rights involved, any charges that may be brought upon which there should be a trial; and that through the attorney general and the governor there would be an assurance that no such proceeding would be had on frivolous or trival charges, or except upon lines that would protect the public and secure equity and justice to all concerned, with but slight expense and without annoying the entire electorate, concerning a matter for which ordinarily it has neither time nor disposition.

With a remedy, so easily provided, or whatever may be lacking in our present procedure, it does not seem wise to resort to the practically untried experiment of the recall, with all its expense, trouble, and annoyance.

Certainly it is not necessary to call upon the 1,200,000 voters of Ohio to sit in judgment upon a charge against some one of our judges that he has committed some kind of a "misdemeanor in office." Certainly it can be better done by a competent tribunal appointed for that purpose. Then why longer consider the recall?

There is only one answer, and that is not a good one—for that answer is: Because the recall is designedly broad enough, where it has been put into operation, to embrace within its scope other purposes than the ascertainment of truth and justice.

Under the constitutions of all the older States the grounds for impeachment are specifically named; they consist of crimes, misdemeanors in office, oppressions in office, conduct involving moral turpitude, gross immorality, and other offenses of the same general character. But in Oregon, where they have instituted the recall, no specific ground is necessary. The language of the statute being, referring to the petitioners who ask for the recall, "They shall set forth in said petition the reasons for said demand,"—their reasons—not reasons named in the constitution or the laws, for there are nowhere in the laws of that State any limitations upon the number or the nature of the reasons the petitioners may assign. The test, therefore, becomes one of personal popularity, pure and simple, and it is so intended.

In consequence, if a judge by a unpopular decision sets this machinery in motion against him, he is liable to lose both his office and his good name as a penalty, not for any wrong he has done, not for any error he has committed, not for any violation or disregard of law, but, on the contrary, it may frequently happen because he has ably and conscientiously done his duty under the law and according to the law he is sworn to uphold.

There can be but one purpose of thus broadening the method of calling judges to account, and that is to take away from the judiciary that independence and that fearlessness, so essential to the important place they are intended to fill in our form of government, to substitute dependence for independence, timidity for courage, with the inevitable result of the loss of that respect our judges have always enjoyed.

It was to escape such possibilities that our judicial system was adopted and our judges were given the great powers they are authorized to exercise.

All the great statesmen of the formative stages of our Republic, including not only the men who framed the Constitution but those like Jefferson, Marshall, and Webster, who put our Government into successful operation and developed its powers—the very men we revere most for their wise, unselfish, patriotic devotion to the great problem of American self-government, have recognized in the independence of our judiciary the very keystone of our national arch, and all have admonished us to jealously guard and preserve it.

To turn our backs upon what these men taught and upon our own experience, by adopting a method of calling judges to account according to the unbridled whim of the requisite number of petitioners, would be to destroy that feature of our system that has made it most useful and inspired us with the greatest confidence that in the fiercest storms that may come it will prove our sheet anchor of safety. Let the judge remain secure, therefore, in his great office from assault and molestation from any and every cause except his own personal and official misconduct. And should he commit error in his rulings and decisions, it would be only to make a bad matter worse to appeal therefrom to the people themselves, sitting as a high court of review.

A court composed of all the voters of the State, not acting under the obligations of an oath and necessarily in large part without many essential qualifications, would be a strange and unfit kind of tribunal

to determine great constitutional questions involving human rights, human liberty, human progress, and possibly, yes, surely, in time, involving the preservation itself of our institutions.

Instead of seeking new and strange ways in which to get away from ancient landmarks, let us rather take renewed confidence in what our fathers gave us, and strive by improving, strengthening, and fortifying to go forward to an assured destiny, full of glory and honor for the Nation, and full of peace, happiness, and prosperity for the State.

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